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NO. 72635-8-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JOHN M. KALAHAR and PEGGY L. KALAHAR, husband and wife,

Appellants,

v.

ALCOA, INC.,

Respondent.

BRIEF OF APPELLANTS

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I. INTRODUCTION

John Kalahar is dying from mesothelioma, a fatal cancer caused by asbestos exposure. John and Peggy Kalahar sued Alcoa, Inc., claiming Mr. Kalahar's illness was caused by asbestos exposure sustained at Alcoa's Wenatchee plant where he worked from 1963 to 1971. Mr. Kalahar alleged that, by intentionally exposing him to asbestos and knowingly misrepresenting its carcinogenic effect, Alcoa fell under the deliberate injury exception to workers' compensation exclusivity set forth in RCW 51.24.020.

Alcoa obtained summary judgment on the ground that RCW 51.24.020 precludes claims for chronic occupational diseases such as mesothelioma that do not immediately manifest at the time of exposure. As discussed below, the Superior Court's holding contravenes the plain language of the statute by prohibiting a diseased worker from *ever* bringing an intentional injury claim, no matter how egregious the employer's conduct. Mr. Kalahar's immediate, visible symptoms from asbestos exposure sustained at Alcoa satisfied the Supreme Court's recent holding in *Walston v. Boeing Co.*, ___ Wn. 2d. ___, 334 P.3d 519 (2014), and Alcoa's knowing misrepresentation of asbestos toxicity exhibited

actual and willful disregard under *Birklid v. Boeing Co.*, 127 Wn. 2d 853, 866, 904 P. 2d 278, 286 (1995). Accordingly, this Court should reverse the Superior Court's summary judgment and remand for trial.

II. ASSIGNMENT OF ERROR

The Superior Court erred in entering its order dated October 24, 2014, which granted summary judgment to Alcoa, Inc. The Court should answer two questions pertaining to this error:

1. Does RCW 51.24.020 bar all claims for chronic occupational diseases that do not manifest at the time of the worker's injurious exposure, no matter how egregious the employer's conduct in causing the plaintiff to be exposed?

2. Did the Kalahars present evidence from which a jury could conclude that Alcoa willfully disregarded actual knowledge of certain injury in satisfaction of *Birklid v. Boeing Co.*, 127 Wn. 2d 853, 866, 904 P. 2d 278, 286 (1995)?

III. STATEMENT OF THE CASE

A. Procedural History.

John Kalahar and his wife, Peggy Kalahar, filed a Complaint for Personal Injuries against Alcoa and seven other defendants on March 21, 2014, claiming that Mr. Kalahar's mesothelioma was caused by asbestos exposure sustained during his employment at Alcoa Wenatchee between

1963 and 1971. The Kalahars alleged that Alcoa inflicted an intentional injury under RCW 51.24.020 by knowingly exposing Mr. Kalahar to asbestos and willfully misrepresenting the toxic properties of asbestos to John Kalahar and his coworkers. On September 25, 2014, Alcoa moved for summary judgment, which Plaintiffs vigorously opposed. CP 1-25. On October 24, 2014, after oral argument, the Superior Court issued an order granting Alcoa's motion for summary judgment. CP 1138-39. In an oral ruling, the Superior Court explained that, because Mr. Kalahar's mesothelioma manifested decades after his employment at Alcoa, recovery was precluded under the Supreme Court's recent holding in *Walston v. Boeing Co.*, 334 P.3d 519:

> So we know that Mr. Kalahar was exposed to asbestos at Alcoa during the time period 1963 to 1970. And I would say at the time he was exposed, that Alcoa knew that more than likely that exposure to asbestos could cause mesothelioma. I would say that they knew the risk...
>
> [A]ccording to *Walston*, the plaintiffs have to, in order to have an exception to the workers' comp remedy, show deliberate intention. And it is a high standard that is met in Washington only when an employer had actual knowledge that injury was certain to occur. Mr. [] Kalahar wasn't diagnosed until 40 years after he left Alcoa. And that's when he and everyone else knew that he had this disease... [T]his Court is obligated to follow the Supreme Court, whether it thinks it's the right decision or not. I don't see how this Court could find otherwise that Alcoa was not certain that injury was going to occur to Mr. Kalahar back in 1963 to 1971.

RP 35-36. The Kalahars timely appealed the grant of summary judgment in Alcoa's favor. CP 1136-37. On November 13, 2014, Appellants filed a Motion to Expedite Review, in regards to which the Court ruled that the current appeal "will be set for consideration on the next available calendar" upon completion of briefing. *See* Notation Ruling of Richard D. Johnson, Court Administrator/Clerk of the Court, dated November 18, 2014.

B. Factual Background.

1. John Kalahar was Exposed to Asbestos at Alcoa for Eight Years Without Any Warnings or Respiratory Protection.

John Kalahar's only identified exposure to asbestos occurred during his employment at the Alcoa Wenatchee aluminum plant from 1963 to 1971. CP 590-591. Internal Alcoa documents identify 82 different asbestos-containing products used throughout the Wenatchee facility, including in the pot rooms, brick masons' shop, and ingot plant. CP 593-94. Mr. Kalahar was exposed to asbestos in each of these locations.

The first area of the plant where Mr. Kalahar worked was in the potrooms. CP 624. Aluminum is produced in hundreds of smelting pots in which alumina bath is converted to molten aluminum with high voltage electricity. According to industrial hygienist Carl Mangold, who worked in the Alcoa Wenatchee laboratory in the 1950s and 1960s, each pot contained over 900 pounds of asbestos insulation. CP 611.

Mr. Kalahar testified that whenever a pot failed, it would have to be "dug out" with jackhammers, and he was frequently in close proximity to this work. CP 624-25. He testified that potlining was going on "[e]very day in more than likely every room. There [] were always pots being repaired." *Id.* Mr. Kalahar again worked in the potrooms as an equipment operator in 1966 for approximately one year, during which time he spent approximately 80 percent of his time in the potrooms cleaning up after potlining operations. CP 630. Mr. Kalahar testified as to how he would pick up debris from potlining operations when working as an equipment operator in the potrooms:

> Q: What role, if any, did you have in conjunction with the pot lining during the time you were operating a front-end loader in the potrooms?
>
> A: Just to clean up any material that was left on the floor, any materials, dust, or stuff like that that anything that was in the backside of the potrooms that needed to be picked up, moved or, you know, put into dumpster buckets. That's what I would do...So sometimes [] almost every room for the— the final cleanup I'd have to get off my machine and sweep up the residue that was left, usually the finer particulates, and sweep them or shovel them into my front-end loader and then dispose of them.

CP 631.

In 1945, Mr. Kalahar worked around Marinite in the "machine shop" as a utility laborer in 1964 and as a sheetmetal apprentice from 1967 to 1971. CP 625-26, 628-30, 632. As a utility laborer, Mr. Kalahar would sweep up

after the machinists and clean their machines. CP 628. As a sheetmetal apprentice, Mr. Kalahar worked within a few feet of machinists doing work on the molds used to form aluminum ingots, which were constructed with Marinite asbestos fiberboard. CP 509. He testified:

> [W]e were right next to the machinists that were working on molds. . . [T]here's really no line of demarcation. We just hooked right up next to each other. And they were putting the molds together, taking out the old Marinite facings and putting in new ones. And, you know, —they cut them across the way at the other place, but they put them together and tore apart the old ones that were either burnt up or plugged and would cut them, sand them, finish them, and put them back together.

CP 634. Mr. Kalahar testified that he worked "within a couple feet" of machinists working on molds and described machinists disassembling and blowing Marinite dust off old molds with compressed air. CP 627, 634-35.

John Cox worked with Marinite molds in the machine shop during the years of Mr. Kalahar's employment there. CP 599-600. Mr. Cox testified that he "tore them apart, chipped the old asbestos off, scraped them off and wire brushed them and then blew all of the material that was left," including dust, with an air hose. CP 602. When building the Marinite molds, he would smooth the Marinite with sandpaper and blow off the dust with an air hose. *Id.* Mr. Cox described that when Marinite was cut or sanded, a fine powdery dust was generated that "flew all over the shop." CP 603. He testified that there was no ventilation on the saws he used in the machine shop or any

other equipment to control dust while milling Marinite prior to 1971. *Id.* Mr. Cox testified that Mr. Kalahar "worked right across the aisleway" when this work was performed. CP 600.

After aluminum is produced in smelting pots, the molten metal is siphoned into crucibles and transported to the furnaces where it is heated and poured into ingot molds. CP 641. These crucibles are lined with refractory brick and insulated with asbestos "shorts" or "feathers." *Id.* CP 635. Mr. Kalahar's work frequently brought him in contact with brick masons performing crucible and trough relining work both in and outside the brick masons' shop. CP 635. He testified that crucibles would be jackhammered out and that asbestos "feathers" were used in creating the new lining, being dumped in a mixer with a serrated edge, which caused "a lot" of feathers to disperse into the air. *Id.* Mr. Kalahar testified that he visited the brick shop on breaks and at lunch, as he knew many masons and also would cut through the brick shop when travelling to other areas of the plant. CP 635. Alcoa internal memoranda confirm that crucible and trough liner repair work at its facilities involved the use of asbestos "shorts" or fiber, dry-mixed with cement in a process that would create a "fair amount of dust" during tear-out operations. CP 578, 580.

As a sheetmetal apprentice, Mr. Kalahar's job duties included constructing "pot shields." Fabricating pot shields required Mr. Kalahar to

cut amosite asbestos cloth to install for insulation on the interior of the shield, using industrial scissors or shears to cut the cloth. CP 633-34. This process created dust, which Mr. Kalahar testified he would blow off of his clothing afterward with compressed air. *Id.*

Plaintiffs' expert industrial hygienist, Susan Raterman, and materials expert, Dr. William Longo, offered expert opinion testimony regarding the asbestos exposures John Kalahar sustained at the Alcoa Wenatchee plant. Ms. Raterman performed a physical inspection of the Alcoa plant and specifically evaluated Mr. Kalahar's exposures at Alcoa and "related them to quantified exposure concentrations that were available in the Alcoa data or that are available in the articles and work simulation studies." CP 697. She concluded that, while working in the pot rooms, Mr. Kalahar sustained exposure "hundreds of thousands of times above background." CP 698-99. Similarly, Ms. Raterman characterized Mr. Kalahar's exposures incident to Marinite work as exceeding the 5 mppcf threshold limit whenever he was near the cutting, sawing, or sanding of Marinite. CP 701. By way of comparison, the 5 mppcf limit applicable in 1968 is approximately 100 times greater than the current OSHA standard. *See* 29 C.F.R. § 1910.1001(c) (setting permissible exposure limit of 0.1 fiber per cubic centimeter of air over an eight-hour time-weighted average).

Dr. Longo also testified that Mr. Kalahar would have been exposed to dust concentrations exceeding 5 mppcf while working in the potrooms in the vicinity of potliners jackhammering, digging, and shoveling pot insulation, which included block thermal insulation. CP 705-06. Dr. Longo further opined on Mr. Kalahar's exposures while working in the machine shop in the vicinity of Marinite mold work as involving exposures "in the 100 to 200 fiber per cc range." CP 706. Dr. Longo also opined that Mr. Kalahar's exposures while sweeping up Marinite dust would have exceeded the 10 fiber per cc range while he was working as a laborer. CP 706-07. Regarding Mr. Kalahar's bystander exposures through furnace relining work performed in the ingot plant, Dr. Longo explained, "using jackhammers to remove block and thermal insulation probably generates, in my opinion, some of the highest fiber levels that you will see." CP 706.

Despite his excessive exposure to asbestos, Mr. Kalahar testified that at no time during the eight years he worked at Alcoa was he ever informed that asbestos was harmful or provided with any respiratory equipment to protect him from injurious exposures. *E.g.*, CP 636-37. Mr. Kalahar never heard of the Wenatchee Works "Industrial Hygiene Committee" and never observed *anyone* wearing respiratory protection during potlining, furnace lining, sawing or sanding of Marinite in the machine shop, digging of troughs and crucibles, or mixing asbestos "feathers" in the brick masons' shop. CP

625-26, 628, 630, 635, 637. He never received warnings or respiratory protection when he personally cut amosite asbestos cloth and blew amosite dust off of his clothing with compressed air. CP 634. Mr. Kalahar testified that he never saw an exhaust hood being installed on the saw used to cut Marinite in the machine shop. CP 629. Mr. Kalahar testified that he never observed air sampling or ventilation in conjunction with Marinite sawing in the machine shop. CP 629-30.

Mr. Kalahar's coworker John Cox testified that, prior to 1971, he was never provided with a respirator or advised to wear a mask while working with asbestos products such as Marinite. CP 604. Dave Dorey, another coworker, similarly testified that he was never advised to wear respiratory protection while working as a brick mason, removing insulation from furnaces. CP 642. Mr. Dorey testified that there were no protocols in place to require the use of respiratory protection during the removal of asbestos insulation in the ingot plant. *Id.* Equally, Mr. Dorey testified that Alcoa personnel did not advise him as to the risks associated with asbestos insulation removal work. *Id.*

Alcoa's CR 30(b)(6) designee confirmed the utter lack of hazard communication and adequate protection of employees from asbestos exposure at the Wenatchee facility. CP 432-40. Alcoa's representative agreed that there is *no evidence* that Mr. Kalahar was ever told by Alcoa

that he was being exposed to asbestos, was ever warned that exposure to excessive levels of asbestos was potentially hazardous, or was ever advised to wear a respirator while working with asbestos or otherwise warned to avoid exposure to asbestos. CP 436. Similarly, he conceded the absence of any evidence that Alcoa attempted to educate Mr. Kalahar as to the asbestos toxicity problem or proper work techniques for controlling asbestos exposure, despite Alcoa's vast knowledge of both. CP 437.

2. *Alcoa's Historic Knowledge of Asbestos Toxicity.*

Alcoa's commanding knowledge of asbestos toxicity predated John Kalahar's employment with Alcoa by over 20 years. Alcoa was a founding member of two of the first industry organizations to address the health risks of occupational dust exposures: the Industrial Hygiene Foundation, established in 1936, and the National Safety Council, established in 1924. CP 420. As a member of these industry organizations, Alcoa received the *Industrial Hygiene Digest*, a compilation of abstracts of publications in the medical and scientific literature on workplace illnesses, and the *National Safety News*, a periodical addressing industrial safety issues, including articles on the disease of asbestosis as early as the 1930s. CP 435, 440.

Alcoa concedes that it knew as early as the 1940s that asbestos was a toxic substance that could cause disease, including deadly and progressive lung diseases that could render a worker a "respiratory cripple." CP 447-48, 452, 455-57, 466, 478, 486-88. By the 1950s, Alcoa knew of the connection between asbestos exposure and lung cancer, and by the 1960s understood the relationship between asbestos exposure and mesothelioma. CP 452-53, 466-67, 483, 489-94. Alcoa also understood the concept of the latency of asbestos-related disease—that symptoms of such diseases manifest many years after initial exposure. CP 452.

Alcoa had dust sampling capabilities and an understanding of the Threshold Limit Values ("TLVs") as early as 1948. CP 443-44, 472, 476. Alcoa's industrial hygienist, Thomas Bonney, acknowledged that the TLVs were established out of concern that exposures to toxins like asbestos in excess of certain levels posed a human health hazard, although they were *not* designed to be protective against cancer. CP 445, 458-59. In 1968, Mr. Bonney authored a chapter in the treatise INDUSTRIAL HYGIENE HIGHLIGHTS, edited by Alcoa's then-chief industrial hygienist, Lester Cralley, which specifically discussed the link between asbestos and mesothelioma. CP 450-51, 529-56.

Indeed, at the time John Kalahar worked around pot lining operations at the Wenatchee plant, Alcoa was fully aware of asbestos toxicity existing in

its aluminum plants. A 1965 "confidential" internal memorandum demonstrates that Alcoa had actual knowledge regarding disease resulting from asbestos used in potlining operations at its plants:

> Use of Asbestos in Potlining Operations:
>
> The following comments are in response to a request for information on this subject by potlining personnel: Asbestosis, a disease resulting only from breathing asbestos dust, is now recognized as being a significant industrial exposure hazard. *Even intermittent exposures to high concentrations, over long periods of time, can result in varying degrees of asbestosis* according to individual susceptibility. *There have been reports of an increased incidence of lung cancer in persons with asbestosis...*

CP 574 (emphasis supplied).

One year before John Kalahar began working at the Wenatchee plant, Alcoa learned of the injurious nature of the Marinite asbestos board it used throughout its facilities, as well as methods of controlling workers' exposures. In 1962, the Vernon, California Health Department inspected an Alcoa plant and made recommendations to Alcoa for minimizing exposures associated with sawing Marinite, including exhaust ventilation and use of respirators during cutting operations. CP 558-65. In response, Mr. Bonney related in an internal memorandum that, although asbestos dust levels from cutting Marinite exceeded the TLV, the decision to ventilate saws "cannot be made on the basis of its being a health hazard." CP 498-99. Instead, Mr.

Bonney advised that the TLVs be used "flexibly and sensibly" with the "possible objective...of being able to disprove alleged injury." CP 499.

Two years later, Alcoa corresponded with Johns-Manville, the manufacturer of Marinite, regarding the product's toxicity. Prompted by workers' complaints of "upper respiratory irritation" and skin irritation when sawing and machining Marinite, Alcoa wrote to Johns-Manville to inquire whether epoxy resin contained in the product might be the cause of these symptoms. CP 517. Johns-Manville confirmed the sole health hazard posed by use of Marinite was asbestos, advising Mr. Bonney that "I would handle the material just as if it were asbestos fiber alone." CP 462, 519.

Equipped with this knowledge of certain injury, Mr. Bonney testified that workers using Marinite in the late 1960s should have been instructed of the hazard. CP 468. He acknowledged that "at least by 1965, if you observed a worker breathing visible dust without protection" while working with Marinite or otherwise engaged in asbestos operations, it would be a "cause of concern" as "either unsafe or potentially hazardous." CP 469. Nonetheless, Alcoa was still cutting and sawing asbestos-containing Marinite products in its plants as of 1984! CP 469, 524-27.

In contrast to Mr. Kalahar and his coworkers, the Alcoa Wenatchee supervisors demonstrated a commanding knowledge of asbestos toxicity, yet kept such knowledge secreted from plant employees. In 1952, an Industrial

Hygiene (IH) Committee was formed at the new Wenatchee Works plant, opened that same year. CP 742. Documentation of the IH surveys conducted under the auspices of the Wenatchee Works IH Committee begin in 1961. CP 756-58. The survey reports are uniformly marked "confidential" and report conditions in various areas of the plant. CP 756, 759, 761, 764-65, 767, 770, 773, 776, 778, 780, 783, 786. As early as 1961, an IH survey notes that a workman in the potrooms was not wearing a mask and advises that air samples should be taken in the breathing zone of the workmen in the potrooms. CP 756.

Beyond its corporate knowledge, Alcoa's local Wenatchee personnel also specifically knew of the injurious results of cutting Marinite without protection. A 1964 "confidential" memorandum from Wenatchee Works industrial hygienist G.D. Bruno states that a study of the dust hazards associated with the cutting of Molten Metal Marinite was conducted, having been "precipitated by complaints" from carpenters that the cutting of Marinite produced "excessive dust." CP 567. Dust counts revealed concentrations of 400-1,500 mppcf—80 to 300 times over the then-governing standard! *Id.* Nevertheless, three years later, Mr. Bonney observed that Wenatchee workers were sawing Marinite for one to two hours per day, and that this work was "unventilated." CP 570. Mr. Bonney recommended that

"the dust generated should be controlled by exhaust ventilation; especially in view of the bad favor in which asbestos is presently being held." *Id.*

Alcoa was also aware of asbestos toxicity associated with the crucible lining work that was performed in Mr. Kalahar's vicinity. In 1968, an Alcoa brick mason in Alcoa's Rockdale, Texas plant posted a newspaper article referencing mesothelioma on a plant bulletin board. CP 835. A resulting memorandum to Alcoa's medical department references "the hazard of cancer of the chest cavity from even short and intermittent exposures to asbestos," faced by brick masons mixing asbestos shorts in crucible repairs. CP 578. Alcoa chief industrial hygienist Lester Cralley observed, the "most outstanding feature" of the newspaper publication was the "cancer known as mesothelioma." CP 580.

Alcoa internal memoranda from the early 1970s further acknowledge asbestos exposure levels resulting from cutting amosite cloth used for many purposes in its plant operations in the range of 10-50 fibers per milliliter. CP 587. The same memorandum compiling a tabulation of Alcoa plant operations associated with hazardous asbestos exposures references "asbestos hazard control" measures and reports that Thomas Bonney had commented, "while the dust-count information may be a useful guideline, variations in plant procedures may make actual local dust counts necessary." CP 582.

As of 1966, an Alcoa Wenatchee IH survey notes that "good potroom ventilating practices" should be emphasized, particularly in light of the fact that potroom workers tend to "button up" the potrooms during cold weather. CP 761. In a survey report dated March 1967, it states that a "new marinite sanding table exhaust system" for the "Shop Building" is in design. CP 765, 767. The following month, the IH survey reports that Marinite sawing is a problem in the carpenter shop area due to the increased thickness of Marinite slabs and the fact that the present exhaust inlets are "unsatisfactory." CP 776. The only reference in the Wenatchee IH surveys to the use of respiratory protection while handling asbestos-containing materials in particular is made in a 1969 IH survey report, which states: "The use of dust masks while handling asbestos should be re-emphasized by the foreman and made a standard practice." CP 786. However, there is no testimonial evidence in the record that respiratory protection was *ever* provided to *anyone* working with asbestos at *any* time during Mr. Kalahar's work at Alcoa Wenatchee, or that any effort was made to control Marinite dust in the machine shop until the late 1960s.

3. *Mr. Kalahar and His Coworkers Experienced Immediate Visible Physical Effects from Asbestos Exposure and Complained to Alcoa Personnel.*

Mr. Kalahar testified that, while working in the sheetmetal shop, the repetitive cutting of amosite asbestos cloth and resultant dust would create an

itchy, fuzzy sensation on his face. CP 633-34. To alleviate this uncomfortable sensation, Mr. Kalahar testified that "several times a day we'd just take an air hose and blow ourselves off [with] compressed air" to remove the residue from the amosite cloth. CP 634. Mr. Kalahar also described the immediate visible symptoms he suffered as a result of working in the dust from Marinite mold work in the machine shop:

> Q: Did you experience any symptoms of any illness or condition or any symptoms whatsoever from your time as a sheet metal apprentice or any time at Alcoa from proximity to someone working on molds?
>
> * * *
>
> A: Yeah. We would breathe a lot of dust in the shop. The shop was a dusty area. There would be a lot of dust from the mold work. There would be a lot of dust from the asbestos cloth. That asbestos cloth as well would be—get all over you. And so those types of things. Sneezing, you know, blowing your nose, those would be the symptoms that I would recall at that time.

CP 1130.

John Kalahar's coworkers at the Wenatchee Works plant also suffered physical effects from working in asbestos dust. John Cox was asked why he requested that Alcoa install exhaust ventilation on the machines used to cut Marinite in the machine shop, and responded as follows:

> The question was why would I ask for this ventilation? Well, because we got nervous about it because, you know, guys would get a sore throat from breathing that stuff. And we just thought it would be better not to have to breathe the dust, yeah.

CP 603.

The symptoms of asbestos exposure experienced by Wenatchee plant workers is consistent with reports from workers at other Alcoa facilities. A 1964 internal memorandum from Alcoa's Research Laboratories summarizes the following symptoms associated with the use of Marinite:

> Several of the men in the Shop have expressed to the foreman that during the machining of the captioned Marinite they experience some discomfort on account of clogging of the sinus and difficulty in breathing. Also, one of them indicated that the Marinite dust irritated the skin on his arms and face.
>
> During the week of March 2, 1964, K.C. Bartholf was machining small Marinite headers in the lathe and it was brought to my attention that he was again having some discomfort, apparently from the dust. I talked to Bartholf and at that time his face seemed dry and red and he indicated that the condition had started almost as soon as he started to work on the Marinite.

CP 651. The same year, Thomas Bonney reported similar symptoms among Alcoa personnel working with Marinite:

> The usual complaint is upper respiratory irritation. Several men have complained to their foremen that they "experience some discomfort on account of clogging of sinus and difficulty breathing." One indicated it irritated the skin on his arms and face. Another, at the start of his work with Marinite, indicated some respiratory discomfort and his face was dry and red.

CP 654. Mr. Bonney later acknowledged the "the "possibility of [Maranite] producing asthmatic-like reactions in sensitive individuals." CP 657. He

also acknowledged that Marinite dust "is capable of irritating the skin and the mucous membranes" of exposed workers. *Id.*

Alcoa personnel at the Wenatchee plant were similarly made aware of worker complaints of symptoms of asbestos exposure. A 1968 "grievance log" for the Wenatchee plant documents a grievance for "failure to provide proper equipment for handling marinite." CP 794. Months later, on February 26 and March 17, 1969, first and second step grievance meetings are documented regarding "lack of safety measures in the brick shop for our protection from the inhalation of asbestos dust." CP 797-99. A "confidential" memorandum reporting on the grievance meetings indicates that the union was told an engineering study was "underway to determine the best solution." *Id.*

Following the 1969 brick masons' grievances, in January 1970, a "confidential" memo from G.D. Bruno at Wenatchee Works summarizes the results of testing for asbestos fiber concentrations during various operations involving asbestos materials performed by brick masons in the brick shop. CP 801-02. Asbestos fiber concentrations during digging box filters measured over 22 and 38 mppcf, four to ten times the then-applicable exposure limit. *Id.* The memo states, "we intend to perform other tests to determine the extent of air loading in other areas in the room as well as carry-

over to other rooms." *Id.* The record does not reveal that Alcoa undertook any measures to address these concerns.

4. Alcoa Willfully Concealed the Toxic Properties of Asbestos From Mr. Kalahar and Similarly Situated Workers.

Testifying in this case, Mr. Kalahar described how he and his coworkers complained to Alcoa management regarding the injurious nature of asbestos, but were assured it was safe:

> Q: [W]ere you ever told anything by Alcoa concerning whether or not asbestos was safe to work with and work around?
>
> A: *We [] were told that it was safe.*
>
> Q: Okay. Tell me about that.
>
> A: There were questions about the materials that we used, and the—the answer was *"These are ... "safe materials."*
>
> Q: And who would tell you that, sir?
>
> A: It was a company line and—that came down. Also, you know, other employees said, "Oh, we've asked those questions. It's—they've told us it's safe."

CP 636-37 (emphasis supplied).

John Cox also testified that, in the 1960s, he specifically asked Alcoa supervisory personnel whether there was any toxic risk posed by working with asbestos, but Alcoa personnel affirmatively lied to him, falsely misrepresenting the safety of this material used ubiquitously in the Alcoa plant:

> Q: Focusing specifically on the time period from when you were hired on at Alcoa until 1971 were you aware at that time of the hazards of asbestos?
>
> A: Well, I had the idea in the back of my mind that asbestos might be—since it was a rock, might be as bad as having black lung from working in a coal mine or something. So I asked the foreman that had worked there for many years the first or second day I worked there, Isn't this hazardous to your health breathing this? And *I was informed that Alcoa had done a study and it had been proven it would not harm you.* Don't worry about it.

CP 604 (emphasis supplied). Mr. Cox testified that, in the late 1960s, he asked Alcoa management about getting ventilation, like a "vacuum cleaner hanging over our lathe to take most of that dust out of the [] area as it was coming off the [] chuck and the lathe or off the drill press." CP 603. Alcoa's response to these requests—which Mr. Cox recalled making maybe eight times—was to say that "we were spoiled from wanting all of this equipment that we didn't need." *Id.* Similarly, John Melton, another former Alcoa Wenatchee Works employee, testified that he recalled air sampling being performed at the plant in the 1970s, but that Alcoa refused to reveal to workers what the purpose of the sampling was. CP 805.

Outside of the Wenatchee plant, Alcoa engaged in the same practice of misrepresentation and intimidation regarding asbestos toxicity. In 1968, an employee of Alcoa's plant in Rockdale, Texas posted a newspaper article regarding mesothelioma and asbestos exposure on a bulletin board at the

plant. CP 835. Alcoa management promptly removed the article. CP 836. The employee was then taken into his supervisor's office and admonished for fomenting fear among plant personnel:

> Q: And what were you told, sir, [] in that meeting with Mr. Cotton and the other individuals, whomever they were who were present?
>
> A: Well, let me quote you exactly what Mr. Cotton said. I never forgot it. He looked me right in the eye and said, "What are you trying to do, scare these men to death?" I said, "No, sir. I just want them to know what is out here."
>
> * * *
>
> Q: Sir, in 1968 when you put that article on the bulletin board and when you were called into the office, what happened after that, sir, with respect to your concerns?
>
> A: Well, let me give you the gist of our conversation the best I recall, and he did the talking and I did the listening. He informed me that he didn't want me doing that anymore, scaring the employees, and that I was not to do it anymore.

CP 835-36.

Alcoa's willful concealment of asbestos toxicity from Mr. Kalahar and his coworkers was consistent with longstanding company policy. Testifying in 1998, Thomas Bonney explained Alcoa's policy to conceal industrial hazards from affected workers:

> Q: [I]f a potential health hazard was of sufficient concern to get your attention in 1948, then would

you agree with me that it would be of sufficient significance to tell the workers about it?

A: Not at that particular time. If it were of significance to do something about it, we would do something about it.

Q: Well, if it was significant enough that it got your attention, [] don't you believe that it would be significant enough to advise the workers about it?

A: Not in the context of 1948. The employees were different, and the manner in which we operated was different. It was a paternalistic organization. We took care of those people without necessarily filling them with a lot of information that they would demand today.

Q: So you give workers a lot more information today because workers demand and require to be told about the workplace hazards they may be exposed to?

A: Yes. And they are more informed, a more intelligent employee today than a generation or two ago.

Q: So, sir, does a less intelligent employee not deserve the same treatment, not deserve to be told about hazards that could ultimately result in serious injury or death merely because they are less educated in the 1940's than they may be in the 1980's; is that what you are telling this jury?

A: I am asking, what purpose would it serve to tell them?... It may have been partially that, but it didn't seem to be necessary. It wasn't necessary at the time.

CP. 484-85.

IV. ARGUMENT

A. The Superior Court's Interpretation of RCW 51.24.020 Removes Occupational Disease Claims from the Intentional Injury Exception.

RCW 51.24.020 sets forth the deliberate injury exception to the workers' compensation system created by the Industrial Insurance Act.[1] For purposes of Chapter 51.24, "injury" is defined as follows:

> For the purposes of this chapter, "injury" shall include any physical or mental condition, *disease*, ailment or loss, including death, for which compensation and benefits are paid or payable under this title.

RCW 51.24.030(3) (emphasis supplied). The legislative inclusion of the term "disease" for purposes of application of the "deliberate intent" exception is decisive in this case.

The Industrial Insurance Act did not always cover "disease." Originally, RCW 51.08.100 defined "injury" narrowly and exclusively as "a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom." *Henson v. Dep't of Labor & Indus.*, 15 Wn. 2d 384, 390, 130 P.2d 885, 888 (1942); *see also Dennis v. Dep't of Labor &*

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[1] RCW 51.24.020 states:

> If injury results to a worker from the deliberate intention of his or her employer to produce such injury, the worker or beneficiary of the worker shall have the privilege to take under this title and also have cause of action against the employer as if this title had not been enacted, for any damages in excess of compensation and benefits paid or payable under this title.

Indus. of State of Wash., 109 Wn. 2d 467, 472, 745 P.2d 1295, 1298 (1987) (at the time of the IIA's enactment in 1911 there was "no coverage for disability resulting from occupational disease"). Starting in 1937, the Legislature expanded the universe of compensable "injuries," and eventually added "occupational disease," defined in RCW 51.08.140, as a basis for compensation. *Dennis v. Dep't of Labor & Indus. of State of Wash.*, 109 Wn. 2d at 472-74 (discussing history of occupational disease coverage in Washington).

The Legislature has generally maintained the distinction between "injury" of an abrupt onset—defined as a sudden and traumatic event—and "occupational disease," which generally occurs as the result of a long-term injurious process to the worker's body. *See* RCW 51.08.140 (defining "occupational disease" as "disease or infection as arises naturally and proximately out of employment"). *Cf. Lehtinen v. Weyerhaeuser Co.*, 63 Wn. 2d 456, 458, 387 P.2d 760, 762 (1963) ("injury" "must be the product of a sudden and tangible happening...of some notoriety, fixed as to time and susceptible of investigation").

A notable exception to this framework is Chapter 51.24 RCW, the statute codifying the deliberate intent exception, where the Legislature brought together sudden and traumatic events and gradually occurring occupational diseases when it defined "injury" for purposes of applying the

"deliberate intent" exception. RCW 51.24.030 defines "injury" for purposes of RCW 51.24.020 as including *both* sudden injuries *and* "diseases," which develop over time.

Because "injury" is defined as "disease" for purposes of application of the deliberate intent exception, and because "disease" is the compensable injury at issue in this case, RCW 51.24.020 must be read as follows:

> If [disease] results to a worker from the deliberate intention of his or her employer to produce such [disease], the worker or beneficiary of the worker shall have . . . cause of action against the employer as if this title had not been enacted, for any damages in excess of compensation and benefits paid or payable under this title.

Yet Alcoa's interpretation of the deliberate injury exception—adhered to by the Superior Court—makes it impossible for a Washington employee to ever prove that his employer deliberately intended "*to produce such disease*," as RCW 51.24.020 and RCW 51.24.030(3) expressly contemplate.

In interpreting statutes, this Court must give meaning to *all* the words chosen by the Legislature and avoid strained or absurd results. *See Lowy v. Peace Health*, 174 Wn.2d 769, 779, 280 P.3d 1078 (2012); *State Dep't of Transp. v. James River Ins. Co.*, 176 Wn.2d 390, 397-98, 292 P.3d 118 (2013) (rejecting interpretation of statute that did not account for or explain all the words chosen by the Legislature); *American Cont'l Ins. Co. v. Steen*, 151 Wn.2d 512, 521, 91 P.3d 864 (2004) (holding that all the words in a statute "have meaning," and "are not superfluous"). Alcoa's interpretation

writes the term "disease" out of RCW 51.24.030(3) and ignores the possibility of proof of an employer's intent "to produce" the resultant disease. Indeed, Alcoa's counsel conceded as much when questioned by the Superior Court at oral argument:

> Q: So how do you respond to Mr. Bergman's argument that if injury includes disease, how is one ever certain that you're going to get a disease?
>
> A: Well, because disease, there can be a quickly developing disease. Perhaps this doesn't include everything. Perhaps it doesn't include a latent occupational disease.

RP 32.

It is patently untenable on the one hand to acknowledge that the Legislature expressly contemplated that a worker could prove that his employer deliberately intended "to produce" disease, and on the other to employ a test that makes it impossible to prove what the Legislature expressly contemplated. The Legislature found that an employer may deliberately intend "to produce such [disease]." *See* RCW 51.24.020. The Superior Court's ruling validating Alcoa's interpretation makes it impossible for an employee to ever prove such deliberate intent under Washington law. Under this reading, no employee could ever prove that his employer knew with certainty that the employee would suffer injury in the form of disease. The statutory test is whether Alcoa intended "*to produce* such injury," RCW 51.24.020, and the only way "to produce" mesothelioma is to deliberately

cause an individual to suffer the certain injurious process of forced and repeated inhalation of asbestos fibers.

If Alcoa's interpretation of RCW 51.24.020 is allowed to stand, an employee suffering from asbestos disease could *never* bring an intentional injury claim, no matter how egregious the employer's conduct. Employers who hire itinerant day laborers to strip asbestos from pipes and boilers are subject to criminal prosecution under the Clean Air Act. *See, e.g., United States v. Rubenstein*, 403 F.3d 93 (2nd Cir. 2005) (upholding conviction of employer who hired day workers to remove asbestos pipe insulation with knife and scissors and failed to tell the workers that they were removing asbestos). Similarly, it is a federal crime to force employees to work with asbestos without informing them of the toxic exposure. *See, e.g., United States v. Starnes*, 583 F.3d 196 (3rd Cir. 2009) (affirming 33-month prison sentences for employers who failed to provide their workers with any personal protective devices during asbestos abatement project and instructed workers to engage in asbestos work practices that created visible asbestos dust); *United States v. Hunter*, 193 F.R.D. 62 (N.D.N.Y. 2000) (defendant employed and supervised workers while they removed asbestos pipe insulation from a building, never told them their work involved asbestos and never provided them with respirators or other protection). Nevertheless, under Alcoa's interpretation of RCW 51.24.020, the same conduct that would

send an employer to federal prison is shielded from civil liability under Washington law. This interpretation is not only absurd, but contravenes the express provisions of the governing statute.

B. Plaintiffs Presented Sufficient Evidence to Create a Fact Issue on Each *Birklid* Factor

Disposition of this appeal is controlled by the Supreme Court's opinion in *Birklid v. Boeing Co.*, 127 Wn. 2d 853. The Supreme Court has never overruled or modified its holding in *Birklid*, despite at least three opportunities to do so. Rather, the Court explicitly reaffirmed *Birklid* in *Vallandingham v. Clover Park School District* 154 Wn. 2d 16, 109 P.3d 805 (2005), and more recently in *Walston v. Boeing Co.*, 334 P.3d 519. Consequently, to the extent the factual record in *Birklid* is analogous to the case at bar, *Birklid* controls and the Superior Court's order granting summary judgment should be reversed.

1. The Circumstances of Mr. Kalahar's Injurious Asbestos Exposures at Alcoa are Analogous to the Toxic Exposures in Birklid.

Birklid arose out of Boeing's use of phenol formaldehyde resin at its Auburn fabrication facility. 127 Wn. 2d at 856. During preproduction testing, the general supervisor wrote to Boeing administrators reporting that obnoxious odors were present and that "employees complained of dizziness, dryness in nose and throat, burning eyes, and upset stomach." CP 838. In

addition, there was evidence that Boeing removed labels on the chemicals to which workers were being exposed and denied access to Material Safety Data Sheets. *Birklid*, 127 Wn.2d at 857.

Birklid originated as a federal action in the Western District of Washington and was subsequently certified to the Washington State Supreme Court. A thorough review of the trial record reveals no evidence that Boeing knew that exposure to the phenolic resins was "certain" to cause specific injuries other than dizziness, burning eyes and upset stomach, let alone that any specific employee would sustain injury. Similarly, in this case, the evidence supports a finding that Alcoa knew that exposed workers were suffering immediate and observable symptoms in connection with asbestos exposure, even if they were not suffering a compensable injury. Moreover, Boeing's misconduct in removing product labels and withholding access to information about workplace toxins mirrors the misconduct of Alcoa in the present case of affirmatively misrepresenting the injurious qualities of asbestos exposures to Wenatchee plant workers. *See generally Birklid*, 127 Wn. 2d at 857.

Alcoa's contention that an employer must know that a *specific* individual will suffer injury is belied by the factual record in *Birklid*. The building where the phenol formaldehyde resin was used housed between 100 and 200 Boeing employees. CP 841. However, only 20 workers sought

treatment at Boeing's in-house clinic for their symptoms, *Birklid* 127 Wn. 2d at 857, n. 2, and only 17 Boeing workers joined in the suit. Indeed, only half of the people who worked with phenolic resins developed any symptoms at all. CP 845-46. Furthermore, even among affected workers, there was wide divergence in the nature and severity of their symptoms. Some plaintiffs suffered from skin problems, headaches, shortness of breath, asthma and depression. The most common chronic illness alleged by the plaintiffs was chemical sensitivity syndrome. One plaintiff claimed she suffered from depression, mood swings, memory loss, paranoia, suicidal ideation, chemical sensitization syndrome, and brain damage as a result of her exposure to the resin. CP 875-80. Another plaintiff only suffered a rash on his hands. CP 883.

Notwithstanding the fact that less than half of the exposed employees developed symptoms and that the nature and severity of symptoms varied widely, the Washington Supreme Court held that Boeing's actual knowledge that *some* workers would become sick was sufficient to satisfy the deliberate injury exception under RCW 51.24.020. The Court explained:

> Boeing . . . knew in advance *its workers* would become ill from the phenol-formaldehyde fumes, yet put the new resin into production. After beginning to use the resin, Boeing then observed *its workers* becoming ill from the exposure. In all the other Washington cases, while the employer may have been aware that it was exposing *workers* to unsafe conditions, its workers were not being injured until the accident leading to litigation occurred.

127 Wn. 2d at 863 (emphasis supplied). It is clear from this language and the facts described above that the Supreme Court did not require knowledge that a *specific* employee would sustain a *specific* injury; rather it was sufficient that Boeing observed its "workers" sustaining injuries from the toxic chemicals.

The notion that Plaintiffs needed to show Alcoa knew Mr. Kalahar specifically would sustain injury was rejected more than 60 years ago, long before *Birklid* liberalized the deliberate injury standard. In *Weis v. Allen*, 147 Or. 670, 35 P.2d 478 (1934), an employer placed a spring gun on the worksite to deter intruders from the premises. An employee accidentally set off the gun and was gravely injured. In the suit that followed, the employer argued that the deliberate injury exception could not apply because it was not certain that any particular employee would be injured by the spring gun. *Id.* at 482. However, the Oregon Supreme Court rejected that argument, reasoning as follows:

> It might have been unforeseen by the defendant that this particular employee or any employee or other innocent victim would be the one to be shot . . . It was not necessary here to prove that the defendant had singled the plaintiff out and set the gun with the express purpose of injuring him and no one else. The act which the defendant did was unlawful and was deliberately committed by him with the intention of inflicting injury.

Id. at 482-84. This language from *Weis* is highly significant because, on two occasions, the Washington Supreme Court expressly recognized the Oregon Court's holding as consistent with (pre-*Birklid*) Washington law. *See Biggs v. Donovan-Corkery Logging Co.*, 185 Wn. 284, 287, 54 P.2d 235 (1936); *Foster v. Allsop Automatic, Inc.*, 86 Wn.2d 579, 582, 547 P.2d 856 (1976). Moreover, the Washington Supreme Court relied on *Weis prior* to its ruling in *Birklid*, which expanded—not contracted—the prevailing rule on when an employee could sue his employer for personal injuries.

2. *Mr. Kalahar's Immediate, Visible Asbestos Exposure Symptoms Distinguish this Case from* Walston.

In granting summary judgment to Alcoa, the Superior Court based its ruling on the Supreme Court's recent holding in *Walston v. Boeing Co.*, 334 P.3d 519. However, the facts of this case are readily distinguishable from *Walston*. In contrast to the eight years of daily asbestos exposure in this case, the sole exposure at issue in *Walston* was a single incident in 1985 when maintenance workers disturbed asbestos insulation on pipes above Mr. Walston's work area. 334 P.2d at 520. While Boeing's conduct appeared callous, there was no evidence that Mr. Walston or any workers in his vicinity suffered immediate visible symptoms from asbestos exposure. *See id.* at 522. Based on this factor, the majority concluded, "Since immediate and visible injury was not present in this case, Walston could not use that to show that Boeing had knowledge of

certain injury." *Id.* In reaffirming *Birklid*, the Supreme Court held that proof of "immediate and visible injury is one way to raise an issue of material fact as to whether an employer had constructive knowledge that injury was certain to occur." *Id.*

Unlike the plaintiff in *Walston*, the Kalahars here have offered evidence that Alcoa employees complained of immediate, visible, physical effects of asbestos exposure, giving Alcoa notice that its workers were being injured by the asbestos dust in which they were repeatedly forced to work. John Kalahar described his personal experience of symptoms associated with breathing asbestos dust while cutting amosite cloth and working in clouds of Marinite dust, including respiratory distress. John Cox relayed that workers experienced sore throats from working in dust. Most significantly, Alcoa internal communications from the early 1960s—shortly after Mr. Kalahar hired on at the Wenatchee plant—document Alcoa's receipt of complaints of immediate physical effects from working with Marinite from workers cutting and machining the asbestos fiberboard. Consequently, the present case is distinguishable from *Walston* and satisfies the *Walston* Court's dictate that Mr. Kalahar must marshal evidence from which a jury could find "immediate and visible injury," showing Alcoa's "constructive knowledge that injury was certain to occur." 334 P.2d at 522.

3. *Washington Case Law Supports Reversal of Summary Judgment.*

In arguing that the certainty of injury prong of *Birklid* requires a 100 percent correlation between exposure and disease, Alcoa relied below on *Vallandingham v. Clover Park School District* 154 Wn.2d 16, 109 P.3d 805 (2005). In *Vallandingham,* two teachers brought suit against their school district for physical injuries inflicted by a severely disabled special education student. *Id.* at 17. In that case, the Court recognized that the injury-causing incidents were infrequent and irregular. *Id. at* 19. In reaching its decision, the Court reasoned that the impact of the chemicals in *Birklid* was predictable, whereas injuries from the student were not predictable. *Id.* The Court explained:

> [T]he employer in *Birklid* was in a vastly different position than the employer in this case. While Boeing *knew* that the phenol-formaldehyde fumes would continue to make employees sick absent increased ventilation, the Clover Park School district could not know what R.M.'s behavior would be from day to day. No one could be sure that R.M.'s violent behavior would not cease as quickly as it began.

Id. at 33 (emphasis in original).

In contrast to the injuries in *Vallandingham*, the injurious disease process resulting from the widespread, ongoing presence of asbestos in the work environment is far from unpredictable. According to Plaintiffs' expert Dr. Brody, when an individual inhales asbestos fibers, the fibers are injected past the airways and become trapped in alveoli, the tiny air sacks where

oxygen and carbon gas exchange takes place. CP 886-87. The more often an individual is exposed, the more injuries are sustained, and the more likely the individual is to develop cancer. CP 888-89. While not all asbestos-exposed workers develop cancer, once the toxin is ingested, no human element can alter the disease trajectory. *Compare Folsom v. Burger King,* 135 Wn. 2d 658, 661, 667, 958 P.2d 301 (1998) (finding that employer had no actual knowledge that injury was certain to occur when a former employee murdered two other employees during the course of a robbery).

At the summary judgment hearing, Alcoa's counsel argued that, in determining whether Mr. Kalahar could seek redress in the tort system for his mesothelioma, "it comes down to risk versus certainty. And risk does not defeat this. Only certainty does." RP 34. However, as the Supreme Court noted in *Wenzler & Ward Plumbing & Htg. Co. v. Sellen*, 53 Wn. 2d 96, 99, 330 P.2d 1068 (1958), "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created..." (*quoting Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264, 66 S. Ct. 574, 580, 90 L. Ed. 652 (1946)). A gambler who spins a roulette wheel is never "certain" that the ball will land on the selected number, but once the wheel is spun, the laws of probability control the outcome. Likewise, an employer who knowingly exposes its workers to asbestos is gambling with their lives. The fact that many exposed

employees will not develop disease cannot absolve an employer from civil liability to those unfortunate employees who do.

In its moving papers below, Alcoa also seized upon non-authoritative dicta in *Shellenbarger v. Longview Fibre,* 125 Wn. App. 41, 49, 103 P.3d 807 (2004), to support its contention that *Birklid* is inapplicable to asbestos disease claims because it is never "certain" than any single exposed individual will develop asbestos disease. CP 12-14. However, this Court's holding in *Shellenbarger* rested on the "actual knowledge" prong of *Birklid,* not certainty of injury. Compared to the lack of evidence presented against Longview Fiber in *Shellenbarger,* Alcoa had a far greater depth and breadth of knowledge of the hazards posed by asbestos use in its Wenatchee plant. 125 Wn. App. at 49. Unlike the scant evidence offered in *Shellenbarger* showing that Longview Fibre *might* have known about the hazards of asbestos in 1964, the evidence presented here is overwhelming regarding Alcoa's knowledge of asbestos hazards.

The knowledge possessed by Alcoa in this case is more analogous to the knowledge held by the employer in *Baker v. Shatz,* 80 Wn. App. 775, 912 P.2d 501 (1996). In *Baker,* employees of General Plastics sued their former employer alleging repeated exposures to toxic chemicals and related health problems. *Id.* at 778. Testimony in the case revealed that the employees complained to their employer regarding skin rashes and breathing difficulties,

and some employees even passed out. *Id.* at 778-79. General Plastics management also acknowledged awareness of the potential health risk posed by the toxic materials. *Id.* at 779.

In *Baker*, Division Two held that the plaintiffs had presented evidence that created a genuine issue of material fact as to whether General Plastics had actual knowledge that injury was certain to occur and willfully disregarded such knowledge. *Id.* at 784. With respect to the first prong of the *Birklid* analysis, the court reasoned that General Plastics had actual knowledge of certain injury based upon the complaints of its employees combined with knowledge from the Material Safety Data Sheets, stating that contact with skin should be avoided. *Id. at* 783.

C. Misrepresenting Asbestos Toxicity to Exposed Workers Constitutes Willful Disregard Under *Birklid.*

1. Application of Birklid *Raises Fact Questions Regarding Alcoa's Subjective Knowledge and Intent.*

Application of *Birklid* to this case largely turns on Alcoa's subjective knowledge and intent in forcing Mr. Kalahar and his coworkers to work with asbestos, while concurrently misrepresenting asbestos toxicity to exposed employees. The extent of an actor's knowledge or intention, however, has long been recognized as a classic factual determination, not amenable to summary adjudication. *Arnold v.*

Saberhagen Holdings, Inc., 157 Wn. App. 649, 661-62, 240 P.3d 162, 169 (2010); *Riley v. Andres*, 107 Wn. App. 391, 395, 27 P.3d 618 (2001); *Mich. Nat'l Bank v. Olson*, 44 Wn. App. 898, 905, 723 P.2d 438 (1986). Thus, determining whether the Kalahars can meet the "actual knowledge" and "willful disregard" requirements of *Birklid* are quintessential fact issues ill-suited to resolution on summary judgment. *See, e.g., Sedwick v. Gwinn*, 73 Wn. App. 879, 873 P.2d 528 (1994).

2. *The Superior Court Held that Plaintiffs Satisfied the Actual Knowledge Requirement of* Birklid.

The record in this case demonstrates that Alcoa had a detailed understanding of asbestos toxicity dating from the 1940s onward, and possessed actual knowledge of injurious exposures arising from work practices that Mr. Kalahar described at the Wenatchee plant. Indeed, while granting summary judgment to Alcoa, the Superior Court made the following finding:

> So we know that Mr. Kalahar was exposed to asbestos at Alcoa during the time period 1963 to 1970. And I would say at the time he was exposed, that Alcoa knew that more than likely that exposure to asbestos could cause mesothelioma. I would say that they knew the risk...

RP at 35. Alcoa has not cross-appealed this holding, so the determination that Plaintiffs satisfied the actual knowledge prong of *Birkld* should be acknowledged as the law of the case.

3. *Misrepresenting Asbestos Hazards to Exposed Workers Constitutes Willful Disregard of a Known Injury.*

The Supreme Court recognized in *Vallandingham* that the "actual knowledge" and "willful disregard" prongs of the *Birklid* test "are not independent of each other." 154 Wn.2d at 29. Persuasive authority from other jurisdictions recognizes the occurrence of an intentional injury where an employer fraudulently misrepresents a risk of harm to employees. In *Johns-Manville Products Corp. v. Superior Court*, 27 Cal. 3d 465, 468, 612 P.2d 948, 165 Cal. Rptr. 858 (1980), for example, the plaintiff worked at the defendant's plant where he was continuously exposed to asbestos, after having been advised that it was safe to work in close proximity to asbestos and never provided adequate protective devices. *Id.* at 469. The California Supreme Court observed that "the Legislature never intended that an employer's fraud was a risk of the employment," nor could the Legislature have intended "to insulate such flagrant conduct from tort liability." *Id.* at 478.

Courts in Illinois, Montana, and Pennsylvania have reached similar results when faced with an employer's fraudulent misrepresentation of occupational health hazards. *See Johnson v. W.R. Grace & Co.*, 642 F. Supp. 1102, 1103 (D. Mont. 1986) (claims brought by employees of vermiculite mine suffering from asbestos-related illness for employer's fraudulent concealment of results of physical examinations and chest x-rays were not

barred by workers' compensation exclusivity); *Handley v. Unarco Indus., Inc.*, 124 Ill. App.3d 56, 72, 463 N.E. 2d 1011, 1023 (1984) (employer's knowing misrepresentation that asbestos was not harmful with the intent that the decedent and his coworkers would rely upon them fell outside workers' compensation exclusivity); *Martin v. Lancaster Battery Co., Inc.*, 530 Pa. 11, 606 A. 2d 444 (1992) (claim for fraudulent misrepresentation not barred by exclusive remedy provision of workers' compensation statute where plaintiff alleged employer fraudulently misrepresented the results of blood tests for lead content).

The record in this case supports a finding that Alcoa engaged in a calculated policy of maintaining the confidentiality of the industrial hygiene information it cultivated, and actively misrepresenting asbestos hazards to exposed employees. Beyond the "confidential" stamp emblazoned on literally every "industrial hygiene survey" memorandum produced by Alcoa in this case, the testimony of workers experiencing the reality of Alcoa's scant industrial hygiene practices confirms the complete lack of warnings and hazard communication relayed to employees at the plant level. The record demonstrates that Alcoa never endeavored in any way to communicate its "confidential" industrial hygiene program to any worker at the Wenatchee plant, let alone John Kalahar. Rather, testimony from Mr. Kalahar, John Cox, and John Melton corroborates the policy of Alcoa management at the

Wenatchee plant to deliberately misrepresent the injurious nature of asbestos to exposed workers.

Eighty-five years ago, Drs. Merewether and Price observed one of the vital measures to prevent asbestos diseases was the "education of the individual.... to a sane appreciation of the risk." E.R.A. Merewether, C.W. Price, *The Occurrence of Pulmonary Fibrosis and Other Pulmonary Affections in Asbestos Workers*, J. INDUST. HYG. 12:198-222, 239-57 (1930). Fifty years later, Alcoa's chief industrial hygienist, Thomas Bonney, characterized Alcoa's approach to communicating the potential hazards of asbestos exposure to workers as coming down to "a question of just how much would you tell them." CP 481. "We took care of those people without necessarily filling them with a lot of information that they would demand today." CP 485. The Court need look no further than the testimony of Mr. Bonney to understand Alcoa's practice of withholding information from workers, as Mr. Bonney openly admitted that Alcoa deliberately hid industrial hygiene information from workers. Alcoa's intentional misrepresentation of information to its exposed workers constitutes a deliberate act inflicting intentional injury upon employees such as John Kalahar. Alcoa should not escape liability for its egregious conduct. The Kalahars respectfully submit that they have marshaled more than adequate evidence from which a jury could find that Alcoa willfully disregarded a

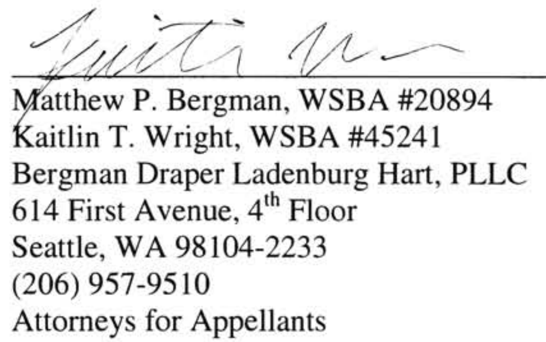
known risk by intentionally exposing Mr. Kalahar to asbestos at its Wenatchee plant.

V. CONCLUSION

Birklid and its progeny do not permit employers to force their workers to rake leaves in a minefield and then claim civil immunity simply because it is never certain which particular employee will step on a mine. This Court should reject a reading of RCW 51.24.020 that excludes occupational disease, and recognize that there are material issues of fact regarding whether Alcoa willfully disregarded knowledge that John Kalahar and his coworkers would develop disease from repeated, unprotected exposures to a known carcinogen. Because the record developed below demonstrates an issue of fact as to Alcoa's intentional injury of John Kalahar, summary judgment was erroneously granted. The Court should therefore reverse the Superior Court's denial of summary judgment and remand this case for trial.

DATED this 5 day of January, 2015.

BERGMAN DRAPER LADENBURG HART



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APPEAL NO. 72635-8

KING COUNTY SUPERIOR COURT NO. 14-2-08149-9

COURT OF APPEALS FOR DIVISION I

STATE OF WASHINGTON

JOHN M. KALAHAR and PEGGY L. KALAHAR, husband and wife,

Appellants,

v.

ALCOA, INC., et al.

Respondent

DECLARATION OF SERVICE

Diana Linde
Bergman Draper Ladenburg Hart
614 First Avenue, Fourth Floor
Seattle, WA 98104
(206) 957-9510

1 I, Diana Linde, declare and state as follows:

2 1. I am and at all times herein was a citizen of the United States, a resident of King County, Washington, and am over the age of 18 years.

3

2. On January 5, 2015, I caused to be served true and correct copies of:

4 a. Brief of Appellants; and

5 b. Declaration of Service, on the following;

6 **II. Via Electronic Mail and ABC Legal Messenger:**

7

8 **Alcoa, Inc.**

Mark B. Tuvim

9 Kevin J. Craig

GORDON & REES, LLP

10 701 Fifth Avenue, Suite 2100

Seattle, WA 98104

11

12 I declare under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

13 Dated at Seattle, Washington this 5th day of January, 2015.

14 BERGMAN DRAPER LADENBURG HART

15

16 *s/ Diana Linde*

Diana Linde

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